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No. 88-5343

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT J. FARMER, Petitioner,

v.

DIRECTOR OF NEVADA DEPARTMENT OF PRISONS,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE DECISION BELOW DID NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent asserts that the decision below rested on an adequate and independent state ground. Indeed, Respondent claims that this assertion is an "inescapable conclusion". Brief in Opposition at 10. Respondent is wrong.

Missing from Respondent's analysis is any mention of the presumption under Michigan v. Long, 463 U.S. 1032, 1042 (1983): this Court presumes the absence of an adequate and independent state ground when the existence of such a ground is "not clear from opinion itself". In its decision, the Nevada court addressed the retroactivity of Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987) cited federal precedent, and declined to apply Booth retroactively "absent the high court's direction". Petition at 2a (Order Dismissing Appeal set forth in appendix). It is not "clear from the opinion itself" that the denial of relief to Farmer rested on the state ground of procedural default. Therefore, under Michigan v. Long, the presumption is that the decision did not rest on an adequate and independent state ground but on the federal ground. Accordingly, this Court has jurisdiction to grant the writ.

II. THE QUESTION OF BOOTH'S RETROACTIVE APPLICATION ON COLLATERAL REVIEW IS WITHIN THE AMBIT OF RULE 17.

Respondent argues that Farmer is "disingenious" [sic] in seeking this Court's review and has failed to state reasons under Rule 17 for granting review. Brief in Opposition at 17 1(c). Respondent is again wrong.

As Farmer made clear in his petition, he is seeking review on the basis that the "question of Booth's retroactivity is a question that has not, but should be, settled by this Court". Petition at 8. This is one of the enumerated bases in Rule 17.1(c). Perhaps inadvertently, Respondent has apparently conceded the "certworthiness" of this question: Respondent admits that "the issue of [Booth's] retroactivity ... may subsequently present an important question of federal constitutional law" that "must be decided some time ...." Brief in Opposition at 8, 20. Farmer submits that the issue is squarely presented in this case.

III. THE QUESTION OF HARMLESS ERROR IS PROPERLY DEFERRED UNTIL BRIEFING ON THE MERITS.

Respondent argues that the admission of victim impact information at Farmer's penalty hearing was "harmless beyond a reasonable doubt". Brief in Opposition at 7. Whether such an error can ever be deemed harmless is unclear. Nowhere in the Booth decision did this Court engage in a harmless error analysis: The risk that victim impact information influenced the capital sentencing decision was itself sufficient to invalidate

Booth's death sentence. Booth 96 L.Ed.2d at 448. See also People v. Simms, 121 Ill.2d 259, 520 N.E.2d 308, 314-315 (1988).

Assuming arguendo that a Booth error could sometimes be harmless, the question of harmless error is not properly addressed at this point. Determining whether the introduction of victim impact information at Farmer's penalty hearing was harmless beyond a reasonable doubt requires a review of the entire record: as Respondent himself admits, "review of the entire sentencing proceeding would have to occur in order to make a determination as to whether or not a finding of harmless error is appropriate". Brief in Opposition at 12. The record of proceedings remains in the Nevada Supreme Court. The question of harmless error relates to the merits of Farmer's case and should be addressed in briefs after certiorari is granted.

CONCLUSION

For the above reasons, petitioner Farmer asks that the petition for a writ of certiorari be granted and this matter set for briefing on the merits.

Respectfully submitted,

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